Bank Bumiputra Malaysia Berhad v First Circle Rubber Products Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUMMONS NO D5-22-80 OF 1991
RAMLY ALI J
30 JUNE 2004

Banking — Banks and banking business — Letter of credit — Advising bank — Whether advising bank obliged to check documents presented to it

Banking — Banks and banking business — Letter of credit — Issuing bank first refused payment due to breach of documentary condition — Whether issuing bank entitled to give new grounds for refusal to effect payment at later stage — Uniform Customs and Practice for Documentary Credits (1983 Revision) ICC Publication No 400 art 16(d) and (e)

Banking — Banks and banking business — Letter of credit — Refusal by issuing bank to pay — Whether refusal of payment due to breach ofdocumentary condition or delay in presentation of documents — Uniform Customs and Practice for Documentary Credits (1983 Revision) ICC Publication No 400 art 16

Contract — Breach — Damages — Alleged loss of investment and profits due to failure of first shipment — Whether substantiated — Whether damages purportedly suffered too remote and unforeseeable — Contracts Act 1950 s 74

The plaintiff had granted a fixed loan facility and an export credit refinancing facility to the first defendant for the purpose of setting up a factory to produce rubber examination gloves. The first defendant entered into an agreement ('the said contract') to sell rubber gloves to a buyer in Germany ('Sanger'). For the purpose of ensuring payment to the first defendant, Sanger obtained a transferable letter of credit from a bank in West Germany known as Bayerische Landeskbank G2 ('Bayerische Bank' or 'the Issuing Bank') favouring the first defendant. Bayerische Bank issued the transferable letter of credit to Sanger and advised the same through another German bank ('Geno Bank' or 'Transferring Bank'). The said letter of credit was advised by Geno Bank to the plaintiff on 29 July 1988. Upon receipt of the same, the plaintiff (as the advising bank) in turn advised the same to the first defendant. The first defendant then shipped the goods on 25 November 1988. The expiry date of the letter of credit was 25 December 1988. By a letter dated 30 November 1988, the first defendant presented the invoices, certificate of origin, bill of lading and SGS Certificate ('the said documents') to the plaintiff and requested the plaintiff to secure the proceeds on their behalf based on the said letter of credit. The plaintiff then forwarded the said documents to Geno Bank. The said documents were then forwarded to Bayerische Bank to secure payment. On 29 December 1988, the plaintiff received a telex from Geno Bank ('the first telex') stating that 'the above mentioned documents remain unpaid due to the following discrepancies: C/O (Certificate of Origin) was not presented in original; and SGS Certificate showing negative remark'. The plaintiff notified the first defendant regarding the rejection of the said documents by Bayerische Bank. Consequently, the documents were not accepted by the Issuing Bank and no payments were made. The plaintiff's contention was that the Issuing Bank had refused payment on the letter of credit purely on documentary non-compliance and that this non-compliance cannot be imputed on the plaintiff.

The defendants, on the other hand, alleged that the expiry of the letter of credit was the reason for the refusal of payment by the issuing bank based on Geno Bank's telex to the plaintiff dated 28 January 1989 ('the subsequent telex'). The second telex arose out of the bill of lading which was only endorsed by the plaintiff and not the first defendant, contrary to the requirement stipulated in the letter of credit. Geno Bank then requested the plaintiff 'to authorize us to endorse the bill of lading in the name of AM Beneficiary so that we are able to forward them to the Issuing Bank without any further delay'. The authorisation was presumably given but the Issuing Bank stated (in the subsequent telex) that the authorisation to endorse the bill of lading was received without a test key and too late and the letter of credit had expired.

The plaintiff filed a writ of summons against the defendants for the recovery of the amounts owed under a fixed loan facility granted to the first defendant. The defendants in turn filed their defences together with a counterclaim against the plaintiff for breach of contract and negligence in respect of a purported mishandling of the letter of credit, which allegedly resulted in tremendous loss of investments and profits by the first defendant. The defendants' contention was that the plaintiff's delay in securing the proceeds on the letter of credit had led to the first defendant stopping its factory operations and the determination of the said contract with Sanger and that if the first defendant had been able to fulfil the said contract for the full period of five years, it would have earned the estimated profit claimed by them.

The first issue to determine was whether the Issuing Bank had refused payment on a breach of a documentary condition, that is, the alleged discrepancies in the said documents or on a breach of a non-documentary condition, that is, the presentation of the said documents after the expiry of the letter of credit. Secondly, it was necessary to determine whether the first refusal for payment by the Issuing Bank was the operative refusal and whether any subsequent reason for refusal (if any) was a non-issue. The third issue to consider was the role of the plaintiff and whether the plaintiff owed the defendants a duty of care beyond that of an advising bank. The last issue was whether the defendants had made out a case against the plaintiff and whether they had proven their claim for damages of alleged loss of investment and profits amounting to over RM7,000,000. The Uniform Customs and Practice for Documentary Credits (1983 Revision) ICC Publication No 400 ('UCP 400') was applicable to the letter of credit at the material time.

Held, allowing the plaintiff's claim and dismissing the defendants' counterclaim:

(1) The parties had agreed that apart from the interest rate of 10.75% per annum, the plaintiff's claim in respect of the fixed loan facility was undisputed. On the question of interest, there was no evidence to show that this issue was being seriously challenged. Therefore, judgment was entered for the plaintiff as prayed for with costs against all the defendants (see paras 17 and 18).

(2) Bayerische Bank did not make payment based on the reasons stated in the first telex. Here, Bayerische Bank had complied with art 16 of the

UCP 400 and gave its reasons for refusal on 28 December 1988, which was within a reasonable time. The reasons given in the first telex were clearly on documentary non-compliance, namely, the failure to comply with the requirements relating to submission of the said documents, which were submitted by the first defendant through the plaintiff. Therefore the failure to comply with the documentary requirements must relate to the first defendant's failure to submit the said documents to the plaintiff. As such, Bayerische Bank's refusal cannot be imputed to the plaintiff (see para 38).

(3) The second issue arose because the defendants had alleged that, based on the subsequent telex, the expiry of the letter of credit was the reason for refusal of payment by the Issuing Bank. Article 16 of the UCP 400 clearly stipulated that if an issuing bank were to decide to refuse the documents submitted for payment, it must give notice to that effect without delay by any expeditious means to the bank from which it had received the documents and such notice must state the discrepancies. Here, the first telex was given in compliance with art 16 of UCP 400 and was given 'within the reasonable time' after the Issuing Bank had received the said documents. Therefore, the first telex was an effective and operative refusal as far as UCP 400 was concerned. As such, the subsequent telex was not the operative refusal by the Issuing Bank (see paras 40, 42 and 43).

(4) In any event, the subsequent telex may not be a telex at all. It was really a handwritten note tendered by the defendants' witness ('DW1'), who in his evidence, said that he had copied this document with his own handwriting. The plaintiff's expert witness had given evidence that he was not sure whether the subsequent telex was in fact a memo or a telex. In any case, since the subsequent telex was so crucial to the defendants' case, the onus was on the defendants to prove its existence but the defendants had failed to do so (see para 44).

(5) If the subsequent telex was indeed a 'telex' in the true sense of the word, the next question to be asked was whether, in view of the provisions of UCP 400, the Issuing Bank was entitled to give new grounds or reasons for its refusal to effect payment on the letter of credit at a later stage. Under art 16(d) and (e) of the UCP 400, an issuing bank must state all the discrepancies in the notice of rejection without delay (that is, within reasonable time). No new discrepancies may be raised after the lapse of a reasonable time (see paras 45 and 46); *Amixco Asia Pte Ltd v Bank Bumputra Malaysia Bhd* followed.

(6) Therefore, the first refusal together with its discrepancies as stated in the first telex was the effective and operative refusal to honour the letter of credit. Hence, the Issuing Bank's refusal to pay cannot be imputed on the plaintiff. Thus, the only logical and undeniable conclusion was that there was no link between the alleged negligence of the plaintiff and the ultimate reason for refusal for payment by the Issuing Bank (see paras 51).

(7) In respect of the third issue, the duty owed by the plaintiff to the first defendant, if any, was laid down and determined by the rules in

UCP 400. The plaintiff's expert witness had testified that as the advising bank, the plaintiff had no obligation to check the documents presented by the first defendant since it was not paying or negotiating the documents presented to it. As an advising bank, the plaintiff's role was merely to act as a 'post-office'. The first defendant was also aware at the material time that the plaintiff would only act as a conduit (without any responsibility) to forward the said documents and to secure payment on its behalf. Under the circumstances, the allegation that the plaintiff had failed to ensure that the bill of lading was endorsed was misconceived. The only one who was entitled, and who ought to have endorsed the bill of lading, was the first defendant as the consignee with title to pass. Any omission therefore was none other than the first defendant's. Accordingly, the defendants had not proven that the plaintiff had breached the duty of care as an advising bank (see paras 59, 60, 67 and 69).

(8) The defendants had alleged that the said contract was terminated because of the failure of the first shipment. This unsubstantiated allegation cannot be accepted. If the allegation were true, surely there must be a default notice issued by Sanger against the first defendant, as required under the said contract. The fact that no default notice was issued prior to the termination of the said contract had cast serious doubts on the defendants' allegation that the said contract was terminated due to the plaintiff's alleged failure (see para 79).

(9) On the question of damages suffered, the first defendant had arrived at the estimation of loss of profit on the basis of producing and selling 2.5 containers per month for the next 55 months from December 1988 less costs and the addition of the loss of profit on the first container. This estimation was made on an assumption that 2.5 containers per month would be sold even though the defendants did not tender any purchase orders from Sanger, as required under the said contract. Since there was no evidence in respect of the reason for termination of the said contract and the date of the termination, the defendants' estimation that the tenure would expire in 55 months was defective, particularly in view of the said contract which provided, inter alia, that the said contract may be terminated by notice. The estimation was also based on the sale price of USD40,000 per container although there was no proof that that was the market value since the defendants themselves had conceded that the prices were fluctuating (see paras 80, 81 and 83).

(10) Therefore, in relation to the last issue, the defendants had failed to prove that the alleged damage was caused by the plaintiff's breach or negligence. The damages purportedly suffered and claimed by the defendants were in any event too remote and unforeseeable and were contrary to s 74 of the Contracts Act 1950 (see para 88).

[**Bahasa Malaysia summary**

Plaintif telah diberikan pinjaman tetap untuk mendirikan sebuah kilang membuat sarung tangan. Defendan pertama telah membuat satu perjanjian

(kontrak tersebut) untuk menjual sarung tangan kepada seorang pembeli di Jerman (Sanger). Untuk memastikan bayaran dibuat kepada defendan pertama Sanger telah mendapatkan satu surat kredit dari bank di Jerman Barat yang dikenali sebagai Bayerische Landeskbank G2 ('Bayerische Bank'). Bank ini telah mengisukan surat tersebut kepada Sanger dan meminta bank yang lain iaitu Bank Geno untuk berbuat demikian. Surat kredit itu telah dikemukakan pada 29 Julai 1988. Setelah menerima surat tersebut, plaintif (sebagai bank penasihat) telah menasihati defendan pertama untuk menghantar barangannya pada 25 November 1988. Tarikh tamat tempoh surat itu adalah pada 25 Disember 1988. Dalam surat yang bertarikh 30 November 1988, defendan pertama telah menghantar invois, sijil asli, bil lading dan dokumen SGS (dokumen tersebut) kepada plaintif dan meminta plaintif menjamin permohonan mereka berdasarkan surat kredit tersebut. Plaintif kemudiannya menghantar kesemua dokumen itu kepada Bayersische Bank untuk mendapatkan bayaran. Pada 29 Disember 1988, plaintif menerima teleks (teleks pertama) dari Geno Bank yang menyatakan bahawa dokumen tersebut tidak lengkap dan surat asal yang dikemukakan tidak asli dan sijil SGS menunjukkan teguran negatif. Plaintif telah memberitahu defendan pertama bahawa dokumennya ditolak oleh bank pembayaran dan dan tiada bayaran yang dibuat kerana penolakkan dokumen yang tidak boleh disalahkan kepada plaintif.

Defendan telah mendakwa bahawa ketamatan tempoh surat kredit itu adalah punca bayaran tersebut tidak dibuat bank pembayaran berdasarkan kepada teleks yang dihantar oleh Bank Geno pada 28 Januari 1989 (teleks berikutnya). Teleks kedua muncul selepas bil lading yang telah diendorskan oleh plaintif dan bukannya defendan pertama dan ini tidak mematuhi apa yang terkandung dalam surat kredit. Bank Geno memohon plaintif untuk 'untuk membenarkan kami untuk mengendorskan bil lading atas nama Am Beneficiary supaya kami boleh memberikannya kepada bank pembayaran tanpa melengahkan masa'. Kebenaran ini dikatakan telah diberikan pada Bayersische Bank (dalam teleks kemudiannya) menyatakan bahawa kebenaran untuk mengendorskan bil lading diterima tanpa kunci ujian dan agak lambat dan tempoh surat kredit tersebut telah pun tamat tempoh sah lakunya.

Plaintif telah memfailkan writ saman terhadap defendan untuk memperoleh wang yang patut diperolehi di bawah skim pinjaman tetap yang telah diberikan kepada defendan pertama. Pihak defendan memfailkan pembelaan dan tuntutan semula terhadap plaintif atas kemungkiran kontrak dan kecuaian mengenai kesilapan mengendalikan surat kredit yang dikatakan telah membawa kepada kerugian pelaburan yang besar dan keuntungan oleh defendan pertama. Hujah defendan adalah kelewatan plaintif dalam mendapatkan hasil kutipan atas surat kredit telah menyebabkan defendan pertama menghentikan operasi kilangnya dan pemutusan kontrak tersebut dengan Sanger, dan sekiranya defendan pertama berupaya untuk menyempurnakan kontrak tersebut untuk tempoh lima tahun dengan sepenuhnya, ia mungkin dapat keuntungan yang dianggarkan oleh mereka.

Isu pertama di sini adalah sama ada bank pembayaran telah menghalang bayaran kerana kemungkiran syarat dokumen, dan percanggahan yang wujud dalam dokumen tersebut adalah kerana tamatnya tempoh surat kredit. Keduanya adalah penting untuk memastikan sama ada keengganan Bayersische Bank membayar adalah keengganan operatif ataupun wujud apa-apa sebab lain untuk keengganan ini. Isu ketiga adalah peranan plaintif dan jika plaintif mempunyai tanggungjawab berjaga-jaga yang melebihi tugas bank penasihat. Isu terakhir adalah jika defendan mempunyai kes terhadap plaintif dan jika mereka dapat membuktikan tuntutan kerugian dan kehilangan pelaburan yang berjumlah sebanyak RM7,000,000. The Uniform Customs and Practice for Documentary Credits (1983 Revision) ICC Publication No 400 ('UCP400') terpakai untuk surat kredit pada masa material itu.

Diputuskan, membenarkan permohonan plaintif dan menolak tuntutan balas defendan:

(1) Pihak-pihak berkenaan telah bersetuju bahawa pada kadar faedah sebanyak 10.75% setahun tuntutan plaintif dalam pinjaman tetap tidak dipertikaikan. Atas isu faedah tidak ada bukti yang menunjukkan bahawa isu ini dipertikaikan dan keputusannya adalah defendan membayar kesemua kos yang dituntut plaintif (lihat perenggan 17 dan 18).

(2) Bank Bayersische tidak membuat bayaran kerana sebab yang terkandung dala teleks pertama. bank ini telah mematuhi art 16 UCP400 dan memberi sebab kenapa enggan membayar wang pada 28 Disember 1988 yang merupakan tempoh masa yang patut. Sebab yang tertakluk di sini adalah ketidakpatuhan dalam penyerahan dokumen. dokumen tersebut telah diserahkan oleh plaintif melalui pihak defendan. Kegagalan defendan menyerahkan dokumen itu adalah kerana defendan gagal menyerahkan dokumen itu kepada plaintif dan jika wang tidak dibayar ini bukan kesalahan plaintif (lihat perenggan 38).

(3) Isu kedua ini adalah kerana defendan telah mendakwa dari teleks yang berikutnya bahawa ketamatan tempoh surat kredit adalah sebab Bank Bayersische tidak membayar wang itu. Dalam art 16 UCP 400 jelas menyatakan bahawa jika bank enggan mengisukan pembayaran mesti memberi notis dengan segera kepada bank penasihat yang menghantar dokumen itu dan juga menyatakan punca percanggahan tersebut. Teleks dalam art 16 UCP 400 telah diberikan masa yang sesuai setelah bank itu menerima dokumen tersebut. Teleks itu juga efektif dan penolakkan itu memandai dalam UCP 400. Teleks yang berikutnya bukanlah keenggan pembayaran (lihat perenggan 40, 42 dan 43).

(4) Dalam keadaan lain teleks yang berikutnya bukanlah teleks tetapi nota bertulis yang diberikan oleh saksi defendan pertama (DW1) dalam keterangannya beliau memberitahu bahawa dia telah meniru dokumen tersebut dengan tulisan tangannya. Saksi plaintif memberi keterangan bahawa bahawa dia tidak pasti sama ada teleks yang berikut itu memo atau teleks. Teleks ini penting kepada kes defendan dan bebanan adalah pada defendan untuk membuktikan bahawa

teleks itu wujud tetapi defendan gagal berbuat demikian (lihat perenggan 44). A

(5) Jika teleks yang berikutnya adalah teleks dan soalan yang patut dikemukakan adalah jika perunutkan UCP 400 Bayersische Bank mesti memberi sebab kegagalan pembayaran surat kredit pada masa kemudiannya. Dalam art 16(d) dan (e) UCP 400 bank tersebut mesti menjelaskan sebab keengganan pembayaran tanpa lengah dan tiada percanggahan baru dikemukakan selepas masa tersebut (lihat perenggan 45 dan 46); *Amixco Asia Pte Ltd v Bank Bumputra Malaysia Bhd* diikut. B

(6) Dalam teleks pertama, keengganan mengiktirafkan surat kredit tersebut kerana terdapat percanggahan. Apabila Bank Bayersische enggan membayar bayaran tersebut tidak boleh menyalahkan plaintif. Jadi kesimpulan yang logik di sini adalah tidak ada pertalian antara kecuaian plaintif dan keengganan bank tersebut membayar wang yang dituntut (lihat perenggan 51). C

(7) Dalam isu ketiga, kewajipan plaintif terhadap defendan dipastikan dari undang-undang UCP400. Saksi plaintif telah memberi keterangan bahawa plaintif tiada obligasi menyemak dokumen tersebut sebelum menyerahkannyakerana defendan pertama tidak membayar plaintif bagi perkhidmatan semakan dan tugas plaintif hanyalah sebagai 'pejabat pos'. Defendan juga tahu bahawa plaintif tidak ada sebarang kewajipan terhadap dokumen atau perolehan wang bagi pihaknya. Dakwaan bahawa plaintif gagal memastikan bil lading itu telah diendorskan adalah salah. Kerana defendan adalah satu-satunya yang berhak dan patut mengendorskan bil lading itu. Kegagalan berbuat demikian adalah kesalahan defendan pertama. Defendan juga gagal membuktikan bahawa plaintif telah memungkir kewajipan berjaga-jaga (lihat perenggan 59, 60, 67 dan 69). D E F

(8) Defendan mendakwa bahawa kontrak dibatalkan kerana kegagalan penghantaran barangan. Dakwaan ini tidak berasas dan tidak dapat diterima. Jika dakwaan ini betul mesti terdapat notis ingkar yang diisukan oleh Sanger terhadap defendan pertama seperti yang tertera dalam kontrak tersebut. Oleh sebab tiada notis ingkar di sini kerana pembatalan kontrak tersebut telah mengakibatkan kegagalan plaintif (lihat perenggan 79). G

(9) Dalam isu kerugian yang dialami, defendan pertama menjangka kerosakan yang dialaminya adalah atas dasar mengeluarkan dan menjual 2.5 kontena setiap bulan selama 55 bulan dari Disember 1988 dan kerugian dari kontena pertama yang dihantar. Dasar ini dibuat atas anggapan bahawa kontena 2.5 itu akan disediakan dan dijual walaupun tiada permintaan tambahan dari Sanger seperti yang tertera dalam kontrak tersebut. Oleh sebab tiada bukti tambahan atas alasan pembatalan kontrak tersebut anggapan defendan bahawa tempoh itu akan tamat dalam masa 55 bulan tidak munasabah tambahan pula terdapat klausa yang menyatakan bahawa kontrak itu dapat ditamatkan secara notis. Anggapan harga jualan USD40,000 itu juga tidak memandai kerana harga pasaran dunia sering turun naik (lihat perenggan 80, 81 dan 83). H I

A (10) Dalam isu terakhir ini, defendan gagal membuktikan bahawa kerugian yang didakwa adalah disebabkan kecuaian dan kemungkiran plaintif. Kerugian ini dituntut oleh defendan dan adalah terlalu sukar dijangkakan dan tidak mematuhi s 75 Akta Kontrak 1950 (lihat perenggan 88).]

B

Notes

For cases on damages, see 1 *Mallal's Digest* (4 th Ed, 2002 Reissue) paras 2275-2297.

For cases on letter of credit, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1703-1727.

C

Cases referred to

Amixco Asia Pte Ltd v Bank Bumiputra Malaysia Bhd [1992] 2 SLR 943 (folld)

Bankers Trust Co v State Bank of India [1991] 2 Lloyd's Rep 443 (refd)

D *Bonham-Carter v Hyde Park Hotel* (1948) WN 89 (refd)

Kerr-McGee Chemical Corp v Federal Deposit Insurance Corp [1989] 872 F 2d 971 (refd)

Lau Sau Kong v Leong Cheng Chiang [1961] MLJ 17 (refd)

Lim Soh Wah & Anor v Wong Sin Chong & Anor [2001] 2 CLJ 344 (refd)

Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989]

E 3 MLJ 360 (refd)

Tan Sri Khoo Teck Puat v Plenitude Holdings Sdn Bhd [1994] 4 MLJ 777 (refd)

Wilsber v Essex Authority [1988] All ER 860 (refd)

Legislation referred to

F Contracts Act 1950 s 74

Wan Alizah Harun (Rajeshee Suppiah with her) (Cheang & Ariff) for the plaintiff

S Selvarajah (L Leonard with him) (Fernandez & Selvarajah) for the defendants

G

Ramly Ali J:

[1] The Plaintiff filed a writ of summons dated 21 January 1991 against the defendants for the recovery of payment under a Fixed Loan Facility and prayed as follows:

H (i) recovery of monies for the amount of RM284,926.98;

(ii) interest at the rate of 10.75% per annum calculated on monthly rests basis from 20 September 1990 until full settlement; and

(iii) costs and other relief as the Court deems fit.

I **[2]** The defendants in turn had filed Defences together with a Counter Claim against the Plaintiff for breach of contract and negligence in respect of a purported mishandling of a Letter of Credit, which allegedly resulted in

tremendous loss of investments and profits by the First defendant. The defendants sought the following prayers:

(i) loss of investments for the amount of RM1,837,461;

(ii) loss of profits for the amount of RM5,221.344;

(iii) interest at the rate of 8% per annum from 15 April 1991 until the date of payment; and

(iv) costs.

[3] The hearing commenced with a trial of the defendants' Counter Claim on 4 February 1999 before Steve Shim J (as he then was) who heard the evidence of DW1 and DW2. Thereafter on 30 October 2000, the hearing continued before Kang Hwee Gee J who heard the evidence of DW3, DW4, DW5, DW6, PW1 and the evidence adduced in examination-in-chief of PW2. On 15 October 2003, I took over the case and heard the rest of the evidence of PW2, PW3, PW4 and PW5.

Facts of the Case

[4] The First defendant was granted a Fixed Loan Facility by the Plaintiff amounting to RM400,000 and an Export Credit Refinancing (ECR) Facility amounting to RM250,000 pursuant to a Letter of Offer dated 30 June 1988.

[5] The First defendant executed a loan agreement dated 24 August 1988 which incorporated terms and conditions of the said Letter of Offer. The facilities were secured by a debenture over all the assets of the First defendant, a banker's guarantee from Court's Bank, England and a guarantee in favour of the Plaintiff by the directors of the First defendant (Second to Sixth defendants), who have irrevocably and unconditionally guaranteed to pay the Plaintiff on demand all monies principal and interest due from the First defendant to the Plaintiff.

[6] The credit facilities were obtained by the First defendant for the purpose of setting up a factory to produce rubber examination gloves for a buyer in Germany known as Sanger Import/Export ('Sanger'). The First defendant entered into an agreement dated 1 June 1988 with Sanger, whereby the First defendant had agreed to sell 1,000,000 units of rubber gloves to Sanger in August 1988 and, for the purpose of ensuring payment to the First defendant, Sanger obtained a transferable Letter of Credit dated 29 July 1988 No 707914/0301/1476 (A 7070) from a bank in West Germany known as Bayerische Landeskbank G2 ('Bayerische') favouring the First defendant.

[7] Bayerische Bank (the Issuing Bank) issued the transferable Letter of Credit to Sanger and advised the same through another German bank, namely Geno Bank ('the Transferring Bank'). Although Sanger appears to be the buyer of the rubber gloves, the facts disclosed that Sanger had pre-sold those gloves to another company known as Lakufol Kumstsoffe

GMBH & Co KG Industriegiet ('Lakufol'). The said Letter of Credit was then advised by Geno Bank ('the Transferring Bank') on 29 July 1988 to the Plaintiff. Upon receipt of the same, the Plaintiff ('the Advising Bank') on 5 November 1998 in turn advised the same to the First defendant, as the final supplier of the gloves in Malaysia.

[8] The First defendant then shipped the goods on 25 November 1988. The expiry date of the Letter of Credit was on 30 December 1988, but as the Bill of Lading was dated 25 November 1988 and the presentation period was 30 days from the date of shipment, thus the expiry date of the Letter of Credit would be on 25 December 1988. By a letter dated 30 November 1988, the First defendant then presented all commercial documents such as invoices, Certificate of Origin, Bill of Lading and SGS Certificate to the Plaintiff and requested the Plaintiff to secure the proceeds (payments) on their behalf based on the said Letter of Credit. Having received the aforesaid documents as per the requirements of the Letter of Credit, the Plaintiff then forwarded the documents to Geno Bank who, after the substitution of documents from Sanger, forwarded the same to Bayerische Bank (the Issuing Bank) to secure payment. Subsequently the Plaintiff received a telex from Geno Bank dated 29 December 1988 stating that 'the above mentioned documents remain unpaid due to the following discrepancies : C/O (Certificate of Origin) was not presented in original; and SGS Certificate showing negative remark'.

[9] The Plaintiff then sent the telex to its Taman Gombak Branch (which was handling the transaction) and the teller had notified the First defendant.

[10] In other words, the documents were rejected by the Issuing Bank (Bayerische) on the above grounds. In respect of the Bill of Lading 'to order, blank endorsed', it was discovered that the said Bill of Lading was not 'blank endorsed'. Geno Bank then advised that the Bill of Lading had only been endorsed by the Plaintiff and that the shipper (the First defendant) had not blank endorsed on the Bill of Lading as required in the Letter of Credit. In a telex dated 20 December 1988, Geno Bank requested the Plaintiff 'to authorise us to endorse the Bill of Lading in the name of A.M. Beneficiary so that we are able to forward them to the Issuing Bank without any further delay.'

[11] The First defendant claimed that on 22 December 1988 it had reminded the Plaintiff to authorise Geno Bank to endorse the Bill of Lading on its behalf.

[12] A subsequent telex dated 28 January 1989 from the Issuing Bank through Geno Bank stated that the authorisation to endorse the Bill of Lading was received without a test key and too late and the Letter of Credit had expired. The documents were not accepted by the Issuing Bank and no payments were made.

Plaintiffs Claim

[13] As to the Fixed Loan Facility granted by the Plaintiff to the First defendant, the First defendant defaulted in the payment of the interest under the facility despite the Plaintiff allowing the First defendant several grace periods up to December 1989 to commence the first monthly instalment of the loan subject to interest being serviced monthly. The Plaintiff then via letter dated 29 June 1990 recalled the Fixed Loan Facility as the First defendant failed to commence production of the gloves at the date promised. The ECR facility was also not disbursed by the Plaintiff to the First defendant due to the same reason.

[14] As at 31 August 1990, the amount outstanding owing by the First defendant to the Plaintiff was RM 409,707.34 with interest thereon at the rate of 10.75% pa calculated on monthly rests basis from 20 September 1990 until full settlement. The Plaintiff then commenced the present action against the defendants, to recover the balance outstanding of RM284,926.98 after deducting the receipt payment under the banker's guarantee from Court's Bank, England for RM131,992.88.

defendants' Counter Claim

[15] The First to Fourth defendants have filed their counter claim in the sum of RM7,058,805 against the Plaintiff for breach of contract and negligence based on the Plaintiff's handling and processing of the said Letter of Credit. The defendants' Counter Claim is premised on the following allegations of negligence on the part of the Plaintiff:

(1) that the Plaintiff failed to apply for payment from Geno Bank through telex dated 8 December 1988,

(2) that the Plaintiff failed to ensure that the Bill of Lading was endorsed with the shipper's endorsement,

(3) that Plaintiff failed to allow the First defendant or contact the First defendant to rectify the documents and/or the defects and/or the ambiguity in the documents at the material time,

(4) that the Plaintiff in receiving the instructions from the First defendant to endorse the Bill of Lading, failed to instruct the same to Geno Bank,

(5) that the Plaintiff failed to send the tested telex regarding the endorsement to Geno Bank to reach the Issuing Bank by 25 December 1988.

[16] For the purpose of these grounds of judgment, I shall deal with the Plaintiff's claim first.

Plaintiff's Claim

[17] In the course of the proceedings the parties had agreed that, apart from the interest rate of 10.75% pa, the Plaintiff's Claim in respect of the Fixed Loan Facility is undisputed. On the question of interest, throughout the defendant's case there is no evidence to show that the issue of interest is

being seriously challenged. Even in their Written Submissions, no issue has been raised on the interest claimed by the Plaintiff.

[18] Therefore, the Court has no hesitation to enter judgment for the Plaintiff as prayed (principal sum plus interest) with costs against all the defendants.

defendants' Counter-claim

[19] The defendants' Counter-claim against the Plaintiff, is for breach of contract and negligence in respect of the Plaintiff's failure to secure the proceeds or payment under the Letter of Credit which, they claimed, had resulted in the loss of investment and profits by the defendants. After going through the lengthy submissions by both sides, the Court finds that there are four crucial issues going to the crux of the disputes in the defendants' Counter-claim, to be determined by the Court. The issues are as follows:

(1) what caused the Issuing Bank, ie, Baryerische Bank to refuse payment on the Letter of Credit, and whether the refusal could be imputed to the Plaintiff,

(2) whether the first refusal for payment by the Issuing Bank, Bayerisch Bank was the operative refusal and whether any subsequent reason for refusal (if any) was a non-issue,

(3) what was the role of the Plaintiff, and whether the Plaintiff owed the defendant a duty of care beyond that of an Advising Bank,

(4) whether the defendants have made out a case and have the defendants proved their claim for damages of alleged loss of investment and profits amounting to over RM7million as alleged or at all.

[20] The issues relate to the operation of the Transferable Letter of Credit. Therefore, it is pertinent at this point to understand what is a Transferable Letter of Credit and how it operates.

Transferable Letter of Credit

[21] A Letter of Credit is an undertaking in writing issued by a bank called the Issuing Bank (in the present case that is Bayerische Bank). It is issued at the request and instruction of the buyer/customer (in the present case that is Sanger), in favour of the seller/beneficiary (in the present case that is the First defendant). In the Letter of Credit, the Issuing Bank gives an undertaking to pay to the seller/beneficiary at a future date upon the seller/beneficiary presenting the requisite documents either directly to the Issuing Bank or to any nominated bank to obtain payment and upon due compliance of all the terms and conditions in the Letter of Credit. A comprehensive definition is provided for in Article 2 of the Uniform Customs and Practice for Documentary Credits (1983 Revision) ICC Publication No 400 (UCP 400). The UCP 400 is the universally recognised set of rules governing Letter of Credit which has been adopted by banks.

[22] These rules are revised from time to time. At the material time (between 1983–1994) UCP 400 was the applicable document.

[23] In the present case, the said Letter of Credit dated 29 July 1988 has the following particulars:

Date of Credit	:	29 July 1988
Credit No.	:	707914/0301/1476(A7070)
Amount	:	Approx USD76,000 (amended to USD65,000)
Issuing Bank	:	Bayerische Landesbank GZ Nuernburg (Bayerische)
1st Beneficiary	:	Sanger Import / Export
Applicant (Transferred Credit)	:	Sanger Import Export
Transferring Bank	:	Genossenschaftiche Zentralbank AG Stuttgart, Germany (Geno)
Advising Bank	:	Bank Bumiputra Malaysia Berhad (Plaintiff)
2nd Beneficiary	:	Hasil Getah Gulungan Pertama Sdn Bhd (First defendant)
Documents	:	Signed Commercial Invoices, 3-fold, Certificate of Origin, Form A issued by a Governmental Authority stating Malaysian Origin, Full set of Negotiable Clean On Board Ocean Bills of Lading, to order, blank endorsed, marked notify Lakufol Kumststoffe GMBH & Co. KG, Industriegesiet, 8561 Henfenfeld and marked Freight Prepaid SGS Certificate with FDA number
Documents Presentation Date	:	Within 30 days from the date of issuance of the shipping document but within the validity date of Credit.

[24] In the present case, the transaction involves a Transferable Letter of Credit. In a Transferable Letter of Credit, the First Beneficiary of the Credit (Sanger) may request its Advising/Transferring Bank (Geno Bank) to

transfer the Credit to the actual Supplier of the goods (in this case – the First defendant) as Second Beneficiary. The process involved in the transaction is as follows:

(1) Application for credit from Applicant (Lakufol) to the Issuing Bank (Bayerische);

(2) Issuing Bank issues the Credit in favour of First Beneficiary (Sanger) and advises it through the Transferring Bank (Geno Bank);

(3) Geno Bank advises the credit to the First Beneficiary (Sanger);

(4) First Beneficiary (Sanger) applies for transfer of the credit to the Second Beneficiary (the First defendant);

(5) Geno Bank transfers the credit and advises it through BBMB (the Plaintiff) as Advising Bank;

(6) BBMB (the Plainitiff) advises the credit to the Second Beneficiary (the First defendant);

(7) defendant presents documents to BBMB (the Plaintiff);

(8) BBMB (the Plaintiff) forwards the documents to Geno Bank;

(9) Geno Bank forwards the documents to the Issuing Bank (Bayerische Bank) after substitution of documents from First Beneficiary (Sanger), for payments.

[25] I shall now deal with all the issues raised for determination.

First Issue: What caused the Issuing Bank (Bayerische Bank) to refuse payment on the Letter of Credit and whether the refusal could be imputed to the Plaintiff.

[26] This issue would lead to a determination of whether the Issuing Bank refused payment on a breach of a documentary condition (ie alleged discrepancies in the commercial documents) or on a breach of a non-documentary condition (ie presentation of documents after the expiry of the Letter of Credit). This issue is closely related to the second issue.

Second Issue: Whether the first refusal for payment by the Issuing Bank, Bayerisch Bank was the operative refusal and whether any subsequent reason for refusal (if any) was a non-issue.

[27] For the purpose of these judgments, it is more appropriate to deal with these two issues together.

[28] The Plaintiff is saying that the Issuing Bank refused payment on the Letter of Credit purely on documentary non-compliance and this non-compliance cannot be imputed to the Plaintiff. The Plaintiff submits that the Issuing Bank's refusal to pay is based on the telex-message dated 29 December 1998. The Plaintiff further contends that this is the effective reason for the refusal and the only reason that can be given under the UCP 400, and that the alleged second reason via telex dated 28 January 1989

which states that the Letter of Credit was not paid due to documents being received by the Issuing Bank after the expiry date of the Letter of Credit, cannot be adduced as an effective reason at a later stage. Accordingly, the Plaintiff argues that there is no causal link between the alleged negligence of the Plaintiff and the cause for non-payment on the Letter of Credit.

[29] The defendants on the other hand rely on the telex message dated 28 January 1989 and allege that the refusal for payment by the Issuing Bank was caused by non-documentary non-compliance, ie, the relevant documents being received by the Issuing Bank after the expiry of the Letter of Credit. The defendants allege that such non-compliance was caused by the Plaintiff's negligence in handling the matter and therefore there is a causal link between the Plaintiff's negligence and the cause for non-payment.

[30] It is not in dispute that Bayerische Bank as the Issuing Bank is under an obligation to pay on the said irrevocable Letter of Credit. By the same token, the right to refuse payment rests with Bayerische Bank. Bayerische Bank did not make payment and had stated in a message found in a telex dated 29 December 1988 from Geno Bank to the Plaintiff the following:

> Above mentioned documents remain unpaid due to the following discrepancies:
>
> (i) Certificate of Origin was not presented in Original;
>
> (ii) SGS Certificate showed negative remarks.
>
> We are holding the documents at your disposal. We will contra at the Applicant to lift reserve.

[31] The said Transferable Letter of Credit was issued by Bayerische Bank in Germany for the purpose of securing payment for the supply of gloves by the First defendant. The said Letter of Credit was first issued in favour of Sanger (also in Germany as the beneficiary and was advised through another Germany bank, namely Geno Bank (the Transferring Bank). The Letter of Credit was then advised by Geno Bank on 29 July 1988 to the Plaintiff as follows:

> 'BY THE FOLLOWING WE TRANSFER IRREVOCABLE CREDIT ISSUED BY BAYERISCHE LANDESKBANK G2 BANK IN NUERNBERG, GERMANY, NOT CONFIRMED BY US IN FAVOUR OF SECOND BENEFICIARY NAMED HEREAFTER. THIS TRANSFER IS SUBJECT TO U.C.P. 1983 REVISION ARTICLE 34 PUBLICATION NO. 400 ... LC AVAILABLE WITH THE ADVISING BANK GENOSSENSCHAFTLICHE ZENTRALBANK AG STUTTGART, BY NEGOTIATIONS AT SIGHT'

[32] From the said advice to the Plaintiff, it is clearly stated that the transfer of the said Letter of Credit is subject to 'The Uniform Customs and Practice for Documentary Credit 1983 Revision, Article 34, Publication No 400'. In other words the Letter of Credit and the transfer relating to it, are subject to UCP 400. Upon receipt of the same the Plaintiff then on 5 November 1988 in turn advised the First defendant. Their letter reads as follows:

> Without any responsibility on our part, we advise the receipt of the above Documentary Credit in your favour ... if you are unable to accept or comply with any of the terms and conditions of this credit, please communicate at once with

your principals with the object of obtaining any necessary amendments prior to presentation of documents to us, this will eliminate inconvenience and delay when documents are presented.

[33] From the above letter, the Plaintiff clearly indicates that the Plaintiff advised receipt of the said Letter of Credit in favour of the First defendant without any responsibility.

[34] The First defendant then shipped the goods on 25 November 1988 (after being advised of the Letter of Credit). The expiry date of the Letter of Credit was on 25 December 1988. By a letter dated 30 November 1988, the First defendant then presented commercial documents such as invoices, Certificate of Origin, Bill of Lading and SGS Certificate to the Plaintiff. The contents of the said letter is reproduced below:

We forward herewith the following documents for negotiations of the above mentioned Letter of Credit on which shipment was effected on 25 November, 1988:

(1) Signed Commercial Invoice 3-Fold;

(2) Certificate of Origin, Form A Issued by a Governmental Authority, showing the country of origin Malaysia;

(3) Full Set of Negotiable Clean on Board Ocean Bills of Lading, to order, blank endorsed, marked notify: Lakufol Henfenfeld, and marked 'Freight Prepaid';

(4) SGS Certificate as per second amendment of 28/9/88.

As the original LC has been amended (second amendment of 28/9/88) payable in Malaysia at the first telex request for payment we would be grateful for your attention in securing the proceeds on our behalf to be credited to our account.

Yours faithfully

[35] Having received the aforesaid documents as per the requirements of the Letter of Credit, the Plaintiff then forwarded the documents to Geno Bank who, after the substitution of documents from Sanger, forwarded the same to Bayerische Bank to secure payment. Subsequent to that, the Plaintiff received a telex from Geno Bank dated 29 December 1988 stating as follows:

RECEIVED THE FOLLOWNG TELEX FROM THE ISSUING BANK:

QUOTE

ABOVE MENTIONED DOCUMENTS REMAIN UNPAID DUE TO THE FOLLOWING DISCREPANCIES:

C/O WAS NOT PRESENTED IN ORIGINAL SGS CERTIFICATE SHOWING NEGATIVE REMARKS

WE ARE HOLDING THE DOCUMENTS AT YOUR PROPOSAL. WE WILL CONTACT THE APPLICANT TO LIFT RESERVES'

UNQUOTE:

DUE TO THE ABOVE DISCREPANCEIS THE ABOVE MENTIONED DOCMENTS REMAIN UNPAID FROM US TOO. WE ARE HOLDING THE DOCUMENTS ...

[36] The Plaintiff then notified the First defendant about the above telex. **A**

[37] When the Plaintiff received the said Letter of Credit, it was clearly expressed that it was 'subject to UCP 1983 Revision Article 34 Publication No: 400' (UCP 400). Clause 16 of the UCP 400 provides (inter alia) as follows:

(b) If, upon receipt of the document, the Issuing Bank considers that they appear on their face not to be in accordance with the terms and condition of the credit, it must determine, on the basis of the documents alone, whether to take up such documents or to refuse them and claim that by appear on their face not to be in accordance to the terms and conditions of credit. **B**

(c) The Issuing Bank shall have a reasonable time in which to examine the documents and to determine as above whether to take up or to refuse the documents. **C**

(d) If the issuing bank decides to refuse the documents, it must give notice to that effect without delay by telecommunication or, if that is not possible, by other expeditious means to the bank from which it received the documents (to remitting bank). Such notice must state the discrepancies in respect of which the issuing bank refuses the document and must also state whether it is holding the documents at the disposal of or is returning them to the presenter (remitting bank or beneficiary as the case may be). **D**

[38] In the present case, Bayerische Bank had complied with Article 16 of the UCP 400 and gave its reasons for refusal on 28 December 1988 (ie, within a reasonable time). The reason given (via telex dated 29 December 1988) is clearly a documentary non-compliance, ie, failure to comply with the requirements relating to submission of the necessary documents. All those documents submitted were actually documents submitted by the First defendant through the Plaintiff via its letter dated 30 November 1988. Therefore, the failure to comply with the documentary requirements must relate to the failure of the First defendant to submit those documents to the Plaintiff. If that is the reason for refusal for payment by Bayerische Bank, then such refusal cannot be imputed to the Plaintiff. It is important to note that in the said telex (dated 29 December 1988), Bayarische Bank had not stated that the reason for refusing payment as being expiry of the Letter of Credit. **E** **F**

[39] In *Amixco Asia Pte Ltd v Bank Bumiputra Malaysia Bhd* [1992] 2 SLR 943, the Court, after reviewing the law (at p 950), held that the Issuing Bank had only one bite at the cherry and said that 'when a statute or contract imposes a time limit to give a reason for doing or refusing to do an act, all grounds to be relied upon must be given within the time allowed, the party must stand or fall on the grounds given within the time.' **G**

[40] The second issue arises because the defendants are alleging that the expiry of the Letter of Credit was the reason for refusal of payment by the Issuing Bank; and that this alleged 'reason' is based on a telex dated 28 January 1989. In the said telex dated 28 January 1989, Geno Bank informed the Plaintiff as follows. **H**

> By order of our customer we have to inform you that your authorization for endorsing the Bills of Lading reached without test key and too late in order to endorse the full set of Bills of Lading within the validity of LC has expired and Issuing Bank does not accept the documents. **I**

[41] The question is: which is the operative refusal by the Issuing Bank – the first one via telex dated 29 December 1988 or the second one via telex dated 28 January 1989.

[42] As stated earlier, the said Letter of Credit was issued and transferred to the Plaintiff subject to UCP 400 (as stated in the advice by Geno Bank to the Plaintiff on 29 July 1988). Article 16 of the said UCP 400 provides for steps to be taken by the Issuing Bank in the event the documents submitted are not accepted for payment. It clearly stipulates that if the Issuing Bank decides to refuse the documents (submitted for payment), it must give notice to that effect without delay by any expeditious means to the bank from which it received the documents and such notice must state the discrepancies in respect of which the Issuing Bank refuses the documents. The contents of the telex dated 29 December 1988 ('the first telex') clearly show that the Issuing Bank was complying with Article 16 of UCP 400 – which is meant for refusal of documents. The discrepancies stated in the said first telex are:

(i) Certificate of Origin was not presented in original;

(ii) SGS Certificate showed negative remarks.

[43] The first telex clearly complied with all the requirements under Article 16 of UCP 400. The telex was given 'within the reasonable time' after the Issuing Bank received all those documents for payment. Therefore it is an effective and operative refusal as far as UCP 400 (which governs the said Letter of Credit) is concerned. In view of this, the Court is of the view that the second telex dated 28 January 1989 is not the operative refusal by the Issuing Bank.

[44] In any event, what the defendants are referring to as a telex dated 28 January 1989 is actually *not* a telex at all. It is a handwritten note that was tendered by DW1, who in his evidence, said that he copied this document by his own handwriting. In this case, DW1 is the maker of this document. The authenticity of the document as a 'telex' from the Issuing Bank or Geno Bank is really in question. The Plaintiff's expert witness had given evidence that the first telex dated 29 December 1988 was the one, on the point of refusal, issued by the Issuing Bank through Geno Bank to the Plaintiff. He testified that if the bank rejects the documents on one ground, it cannot go for other grounds later. He further testified that the handwritten second telex dated 28 January 1989 had no bearing on the dispute and had honestly answered that he could not make up what it's all about. He was not sure whether the so-called telex was a memo or telex. If the said 'telex' (dated 28 January 1989) was so crucial to the defendants case, then the onus is on the defendants to prove the existence of the said telex. The defendants have failed to do so.

[45] If at all the said document (dated 28 January 1989) is to be accepted as a 'telex' from the Issuing Bank, then the next question to be asked is whether, in view of the provisions of UCP 400, the Issuing Bank is entitled to give new grounds or reasons for its refusal to effect payment on the Letter of Credit at a later stage.

[46] As I had stated earlier, Article 16 (particularly para (d) and (e) of UCP 400 bars the Issuing Bank from a second bite at the cherry. The Issuing Bank must state all the discrepancies it seeks to rely on in the notice of rejection without delay. This means within reasonable time. No new discrepancies may be raised after the lapse of a reasonable time. By this Article 16 the parties (particularly the Issuing Bank) have clearly contracted out of the liberty of adducing additional discrepancies after the lapse of reasonable time. In this case UCP 400 imposes a time limit (ie within a reasonable time) to give a reason for the refusal. Therefore, all grounds to be relied upon must be given within the time allowed. In this respect, I am in full agreement with GP Selvam JC in *Amixco Asia Pte Ltd v Bank Bumiputra Malaysia Bhd* [1992] 2 SLR 943 (Singapore High Court) when he ruled:

> … when a statute or contract imposes a time limit to give reason for doing or refusing to do an act, all grounds to be relied upon must be given within the time allowed. The party must stand or fall on the grounds given within the time. It would be illogical if the same ground may be given at a later time as it would negate the statute or contract. I would accordingly hold that in credits subject to the UCP, new grounds of rejecting documents may not be given after reasonable time. Article 16 (d) and (e) bars a second bite at the cherry.

[47] In that case (*Amixco Asia*) the Judge adopted the reasoning given in *Case Studies in Documentary Credit* (1989) Case 53, which states as follows:

> Query:
>
> If documents contain several discrepancies but the Issuing Bank only states one of them in its notice of refusal and if that discrepancy turns out to be invalid can the Issuing Bank then legitimately raise the other discrepancies to refuse the documents?
>
> Answer:
>
> Article 16(d) gives the answer to this question because it clearly evidences that 'such notice must state the discrepancies, the Issuing Bank would not be entitled to raise discrepancies which it had not raised in its notice of refusal.'
>
> Article 16(d) is perfectly clear in its statement that in respect of rejection of documents and giving notice of rejection.
>
> 'Such notice must state the discrepancies in respect of which the Issuing Bank refuses the documents ...'
>
> This is common sense since it might be possible for the discrepancies to be rectified and the documents to be represented within the time limits of arts 46 and 47(a).
>
> If therefore, the Issuing Bank rejects the documents and states only one discrepancy but later tries to raise other discrepancies for the purpose for refusing the documents, obviously this is contrary to UCP 1983 and also contrary what would be fair treatment to then beneficiary.

[48] The same reasoning ought to be adopted in the present case.

[49] The United States Court of Appeals in *Kerr-McGee Chemical Corp v Federal Deposit Insurance Corp* [1989] 872 F 2d 971 in applying the

discrepancy provision in the UCP 400 (1983), held that a bank would be estopped from subsequently asserting a ground not taken initially. Associate Justice Powell, in that case, held:

> The question presented is whether, after initially dishonouring a Letter of Credit on the basis of specified grounds, a bank may subsequently dishonour the credit on the basis of a different ground. We think that under the Uniform Customs and Practices for Documentary Credits, which are expressly incorporated by Letter of Credit at issue here, the appellant bank was required to state all of its reason for dishonoring the credit when it was first presented.

[50] The same principle was adopted by the English Court of Appeal in *Bankers Trust Co v State Bank of India* [1991] 2 Lloyd's Rep 443, where in that case Hirst J held that if the Issuing Bank failed to state valid discrepancies within a reasonable time, it would be precluded from avoiding liability on the ground that the documents were discrepant, as time would not be extended to enable it to consult the applicant for additional grounds.

[51] Based on the above principles and considerations I am of the view that the first refusal together with its discrepancies, as stated in the first telex dated 29 December 1988 was the effective and operative refusal to honour the said Letter of Credit. It is based on documentary non-compliance based on the failure of the First defendant to submit proper documentation as required by the Letter of Credit. Therefore the avoidance of payment cannot be imputed to the Plaintiff. Thus, the only logical and undeniable conclusion is that there is no link between the aforesaid alleged negligence of the Plaintiff and the ultimate reason for refusal for payment by the Issuing Bank.

Third Issue: What was the role of the Plaintiff and did the Plaintiff owe the defendant a Duty of Care beyond that of an Advising Bank.

[52] The defendants submit that the Plaintiff was negligent and in breach of its duty arising out of the banker-customer relationship between the Plaintiff and the First defendant. The defendants further submit that the Plaintiff had a duty as the First defendant's banker to check all documents that were presented to the Plaintiff. That duty, according to the defendants arises from the credit facilities it enjoyed in which the Letter of Credit was a means of repayment of the credit facilities. The defendants contend that the failure of the Plaintiff to properly process the Letter of Credit transaction which included sending authenticated telex messages for the purpose of securing the payment, amounts to negligence and a breach of its duty to its customer, the First defendant. The defendants submit that the Plaintiff owed a duty of reasonable care and skill to the defendants arising from the following facts, namely:

(i) the Fixed Loan Agreement for which the Letter of Credit was the means of repayment;

(ii) the ECR facility granted under the Letter of Credit (as security) in which the Letter of Credit was the means of repayment;

(iii) the Plaintiff was the agent of the First defendant for collecting funds under the Letter of Credit; and

(iv) the professional duty of the task undertaken in securing the proceeds.

[53] To the defendants, the failure of the Plaintiff to adhere to standard banking procedure when sending the telex message dated 23 December 1988 led to the documents being presented to the Issuing Bank after the expiry of the Letter of Credit on 25 December 1988.

[54] The defendants claim that this breach of a non-documentary condition under the Letter of Credit caused the non-payment of the Letter of Credit leading to the defendants suffering financial losses. The defendants also claim that the Plaintiff's failure amounted to a breach of its duty both in tort and contract arising out of the banker-customer relationship.

[55] Specifically, the defendants allege that the Plaintiff was required to authorise the Transfer Bank (Geno Bank) to endorse that Bill of Lading within the validity of the Letter of Credit as required by Geno Bank on 20 December 1988. The Plaintiff was also required to do so under the specific instruction it received from the First defendant on 22 December 1988. The defendants claim that the Plaintiff did so but negligently in that the authorisation was sent without a test key and was late resulting in the said authorisation not being validly made as subsequently revealed by the 'telex' message dated 28 January 1989. This led to the position that the Letter of Credit had expired and therefore the Issuing Bank had no obligation to pay.

[56] In the banking industry, the scope of duty owed by banks to their customers relies on the type and nature of the services rendered by the banks to the respective customers. Banks usually provide various services to customers. The bank-customer relationship would depend on the nature of the services rendered to the particular customer.

[57] In the present case, it is not disputed that the Plaintiff granted credit facilities to the First defendant in the form of a Fixed Loan facility and Export Credit Refinancing (ECR) facility. At the material time, the Fixed Loan Facility had been utilised rendering the Plaintiff a lender and the First defendant a borrower, in relation to the Fixed Loan. The Plaintiff therefore owes a duty of care as creditor and debtor only in relation to the said loan facility.

[58] As for the ECR facility, the Letter of Offer dated 30 June 1988 stipulated that the ECR was meant for *'additional working capital to finance the preparation of goods before shipment'*. The security for the ECR was against Inward Letters of Credit from banks. The ECR facility had not been utilised for the prescribed purpose, ie, 'to finance the preparation of the goods before shipment'. In fact the disbursement conditions for the ECR facility had yet to be fulfilled. In this case, the Letter of Credit in dispute was not presented to the Plaintiff as security at all. Thus, there is no nexus between the said Letter of Credit and the ECR facility.

[59] The notation on the said Letter of Credit clearly states that 'this transfer is subject to UCP 1983 Revision Article 34, Publication No: 400 (UCP 400)'. The Court is of the view that the dispute in relation to the said Letter of Credit and the duty of care (if any) is governed by the provisions of UCP 400. The defendants' attempts at drawing a banker-customer relationship between the Plaintiff and the First defendant due to the mere existence of the credit facilities (Fixed Loan and ECR) is too general and disregards the precise nature of the relationship between the Plaintiff and the First defendant. Such a broad generalisation disregards entirely the UCP 400 rules, which have been precisely laid down to determine the parties rights, duties and obligations in relation to documentary credits, In *Amixco Asia* (supra) the Court succinctly states that 'a documentary Letter of Credit subject to the UCP is a free standing instrument of payment.' That being the case, the duty owed by the Plaintiff to the First defendant, if any, is that which has been laid down and determined by UCP rules.

[60] The Plaintiff's expert witness (PW2) has in his evidence elaborated on the roles and duties of the Issuing Bank (Bayerische Bank), the Transferring Bank (Geno Bank) and the Plaintiff as the Advising Bank in Malaysia. PW2 gave evidence that the role of the Plaintiff as the Advising Bank is as follows:

(i) To advise the credit to the First defendant as the second beneficiary;

(ii) To forward the documents to the Transferring Bank (Geno Bank) at the request of the First defendant;

(iii) It had no obligation to negotiate even if the credit is made available at the place of the First defendant (unless the bank had confirmed the credit);

(iv) It has no obligation to check documents presented by the First defendant since it is not paying/negotiating documents presented to it;

(v) It will not normally pay or negotiate when documents are presented to it because the documents are not being forwarded directly to the Issuing Bank but to a Transferring Bank which has not given its undertaking;

(vi) It will not make payment (under the payment credit) because payment will be without recourse to the First defendant.

[61] The Court is convinced that the Plaintiff's role as the Advising Bank, as opposed to Negotiating Bank, as elaborated by PW2, thus defines the scope of duty owed to the First defendant and in this respect the expert's opinion (PW2) remained constant and unshaken during cross-examination.

[62] Having resolved the issue of the role of the Plaintiff and the duty owed to the First defendant, I shall now address the specific act which constitutes the alleged negligence as pleaded by the defendants.

[63] In relation to the allegation that the Plaintiff failed to apply for payments from Geno Bank through telex dated 8 December 1988, the

Court is of the view that this is a non-issue due to the undisputed fact that the Plaintiff had on 3 December 1988, together with the shipping documents and the covering schedule for the Letter of Credit for USD65,000, sent instruction to Geno Bank stating – 'Please credit our Kuala Lumpur Office account with you under telex to them and airmail advise to us quoting our ref. No. ILC/GMBK/10688/009.'

[64] The defendants have also alleged that the Plaintiff failed to ensure that the Bill of Lading was endorsed with the shipper's endorsement and that the Plaintiff failed to allow the First defendant or contact the First defendant to rectify the documents and/or the defects and/or the ambiguity in the document at the material time.

[65] To resolve this issue it is pertinent to determine – whose obligation it was to endorse the Bill of Lading and whether the Plaintiff was under any obligation to check the documents tendered.

[66] The Bill of Lading passes title to the goods in question: The goods in question (ie, the rubber gloves under shipment) were owned by the First defendant. The title was with the First defendant. For the purpose of payment under the said Letter of Credit, the title is to pass to the buyer upon payment being cleared. Therefore, in order for the goods to pass good title, the First defendant as the shipper must endorse the Bill of Lading. This position is endorsed both by the Plaintiff's as well as the defendants' expert witnesses (PW2 and DW2). DW2 in his evidence has said. 'So, to transfer the title of the goods, the shipper (First defendant) would have to endorse at the back of the Bill of Lading.'

[67] As an advising bank, the Plaintiffs role is merely to act 'as a post-office'. This role of the Plaintiff is in consonance with the letter dated 5 November 1988 sent by the Plaintiff to the First defendant which reads; 'Without any responsibility on our part, we advise the receipt of the above Documentary Credit (the said Letter of Credit in your favour ...'

[68] It is also in consonance with the letter dated 30 November 1988 sent by the First defendant enclosing the documents mentioned in the Letter of Credit to the Plaintiff which reads as follows:

> As the original LC has been amended (second amendment of 28/9/88) payable in Malaysia at the first telex request for payment we would be grateful for your attention in securing the proceeds on our behalf to be credited to our account.

[69] From the contents of the two letters, it is clear that the First defendant was aware at the material time that the Plaintiff would only be acting as a conduit (without any responsibility) to forward documents and to secure payment or the proceeds. The Plaintiff had acted only as an Advising Bank. The Plaintiff had not assumed the responsibility to pay on the said Letter of Credit, and thus had no obligation to check the documents to effect payment. It would have been different if the Plaintiff had acted as a Negotiating Bank, ie, the paying bank. Under the circumstances, the allegation that the Plaintiff had failed to ensure the Bill of Lading was endorsed is misconceived. The only one who was entitled to,

and who ought to have, endorsed the Bill of Lading in question is the First defendant as the consignee with title to pass. Any omission therefore was by none other than the First defendant. The allegation of negligence above is nothing more then a desperate attempt on the defendants' part to shift the blame for their own omission onto the Plaintiff.

[70] Rejection and refusal of payment of the Letter of Credit by the Issuing Bank (Bayerische Bank) was solely due to the discrepancies of the documents or documentary non-compliance, ie, the Certificate of Origin was not in original and the SGS Certificate showed negative remarks. This documentary non-compliance cannot be imputed to the Plaintiff. The first refusal above is the operative refusal and is consistent with the rules under the UCP 400. Any subsequent refusal would be of no effect and is immaterial. The Plaintiff's obligation and duty is laid out in the rules of the UCP 400 and does not extend beyond that of an Advising Bank. The existence of a separate duty of care beyond that posited by the UCP 400 rules has not been proved. Nor have the defendants proved that the Plaintiff had breached the duty of care as an Advising Bank that acted as a conduit to secure the proceeds of the Letter of Credit on behalf of the First defendant.

[71] Causation being the most essential element upon which a claim will stand or fall remains unproven.

Fourth Issue: Whether the defendants have made out a case and have the defendants proved their claim for damages of alleged loss of investment and profits amounting to over RM7 million as alleged or at all.

[72] In their counter-claim, the defendants claimed against the Plaintiff for breach of contract and negligence in respect of the purported mishandling of the Letter of Credit, which allegedly resulted in loss of investments in the amount of RM1,837,461 and loss of profit in the amount of RM5,221,344.

[73] Have the defendants proved their claim for damages as alleged or at all?

[74] The answer to this question is dependent on the defendants proving that the loss of RM7,058,805 was incurred due to the alleged mishandling of the Letter of Credit by the Plaintiff and that the damages suffered did in fact amount to RM7,058,805. This is so as it is axiomatic that a party seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither the claim must fail.

[75] The gist of the defendants' contention on this point is that the delay in the Plaintiff securing the proceeds on the Letter of Credit led to the First defendant stopping its factory operations and to the determination of the sales contract with the buyer in Germany. The defendants allege that if the First defendant had been able to fulfil the sales contract for the full period of five years, it would have earned the estimated profit claimed by them.

[76] For the record, it is observed that DW1 had given evidence that the First defendant had in fact received the sum of USD27,500 for the shipment on 25 November 1988. It is also to be noted that the Letter of Credit was merely a mode of payment. No explanation had been tendered as to why the First defendant had not secured payment directly from the buyer. DW1 also gave evidence that the goods had reached Hamburg, Germany by 15 December 1988. Payment could therefore be secured through other means from Sanger, the buyer, had the goods sold met with the specifications of the buyer.

[77] The defendants' contention that the entire cessation of operation was due to the delay of the Plaintiff in handling the Letter of Credit must be carefully assessed against the following facts:

(i) Sometime in March 1989, the First defendant wrote to the Plaintiff asking for deferment of the full release of the total loan of RM400,000 for three months and for a grace period, up to July 1989 to make the first instalment for repayment. the First defendant had also indicated that they were capable of producing at 100% capability in April 1989 (see p 107 –Bundle G).

The Court is of the view that the very request for deferment of the release of the loan is contrary to the defendants' allegation that the First defendant was vulnerable to failure due to lack of capital and that the delay affected the First defendant's cash flow which led to a shut down of operations and that the First defendant had no other means of financing the operations.

(ii) The Plaintiff sent a letter dated 30 March 1989 to the First defendant approving the deferment provided that the First defendant serviced the interest every month, thereby enabling the First defendant to face the alleged cash flow problem (if any).

(iii) the First defendant then sent another letter dated 20 April 1989 to the Plaintiff stating that 'the European glove market had collapsed and that stock was being dumped below cost price by Taiwanese and Chinese manufacturers.' The First defendant further gave statistics of the current market condition that was 'upsetting' the market at that material time. The said letter dated 20 April 1989, signed by DW1 who was the Managing Director of the First defendant, is reproduced below:

> We refer to our letter dated 22nd March on the subject of the deferment of the repayment period of the Fixed Loan facility and thank you for your letter in reply thereto.
>
> We wish to submit to you a plan of action in order to survive the current difficult period in the industry experienced by all Malaysian glove manufacturers for which we seek your support and assistance.
>
> We have been informed by our buyer M/S Sanger of West Germany that the current market for examination gloves is quite tight and that the prices in European have collapsed. This is attributed to the fact that stocks of gloves are being dumped at below cost prices by Taiwanese and Chinese

manufacturers who have been faced with the prospect of closing up due to a large amount of their production being rejected by buyers in the U.S. due to their inability to meet the standards required by the FDA. Consequently it is said that consistent orders may not be possible during the next three months which may not enable the factory to follow a regular production run.

Reports of current market conditions for examination gloves in the U.S.A. depict a market demand of 8.2 billion pieces of gloves per annum with a growth prediction of 20% per annum. So far the main supply has been from Taiwan (40% of the U.S. market), China (20% of the U.S. market) and Malaysia (20% of the U.S. market). However it is said that almost 70% of both Taiwan and Chinese manufacturers have been forced to close-up due to the rejection of goods by buyers due to quality problems in the past and their inability to meet the new FDA standards. These manufacturers have now resorted to clearing their stocks and selling them in Europe at below cost prices and hence upsetting the market equilibrium. Further U.S. glove buyers appear to be having surplus stocks which is expected to last them for the next three months. We have enclosed herewith a document presented at a seminar conducted by the RRI in Malaysia in February 1989 which highlights the glove market, for your information.

We are of the opinion that we should be shifting to marketing in the U.S. rather than Europe due to the strict quality controls adopted by the FDA in the USA. Both our gloves and the factory are well above the FDA and American Standards for Gloves. Although at present there is an over supply situation in the USA, this situation is expected to normalise by June this year. With this in mind, we have approach M/S Carolon Co of Winston-Salem, North Carolina, one of the largest pharmaceutical distributors and manufacturers in the U.S. on our behalf as well as on behalf of two other glove manufacturers in Malaysia who wish to enter new markets for the sale of gloves. We have had reasonable assurances that they will be handling our sales from the summer of 1989 which is June–July this year. We shall forward to you a fax copy of their letter of intent upon receipt.

The current market position may require us to decide whether we should accept our buyers offer from Germany based on the European market price and produce at break-even or below or hold on for the next three months without much activity.

The Company is at the moment undergoing a severe cash constraint due to the problems associated with the container exported in November 1988 under LC 707914/0301/1476, (A7070): ILC/GMBK/10688/009 which documents were placed at our disposal due to inability of the Branch at Taman Sri Gombak to procure the proceeds on our behalf according to the terms contained in the LC, which circumstances are known to you and are contained in the numerous exchange of telex messages. We have in the process made a loss of over USD37,500. This problem also has had an adverse effect on the factory production schedule. Due to the disruption of the regular production schedule consequent to the current market in Europe we have had no income from the month of February, 1989 and the additional loss incurred has placed the Company's cash position under severe constraint. We have at present temporarily curtailed production to tide over the difficult period.

In order to carry on the business of the Company as well as be equipped for the U.S. market in June this year, we wish to request the following, which would greatly contribute to the survival of the Company:

The disbursement of the fixed loan of which the available balance is approximately M$31,000 be disbursed as follows:

(a) Interest on the fixed loan facility at approximately M$3,200 per month from February, 1989 to June 1989 – 5 months – M$ 16,000

(b) Factory Lease Rental of M$6,50 per month payable to M/S Sang Kee Oil Industries Sdn. Bhd. be paid for the month of May and June 1989 – M$13,000. A copy of this rental agreement is in your possession. The rental is due on the 7th of each month.

This would amount to a total approximate M$29,000 which we request be debited against our Fixed Loan facility which would then completely drawdown the Loan.

We wish to thank you for your cooperation and look forward to your continued assistance and support and early approval of the above.

Thanking you.

Yours faithfully,

HASIL GETAH GULUNGAN PERTAMA SDN BHD

Sgd.

SUNIL JAWARDENA

MANAGING DIRECTOR.

The First defendant also informed Plaintiff they had curtailed production and requested for the Fixed Loan to be disbursed to settle the interest of RM16,000 and their factory rental of RM6,500. However, the Plaintiff did not approve the request as the Fixed Loan was for the purposes of financing the purchase of machinery. This rejection was notified to the First defendant vide letter dated 26 April 1989. The First defendant defaulted in the payment of interest under the Fixed Loan Facility. Nevertheless, the First defendant came up with a settlement proposal stating that they had taken positive steps with a view to securing a long term marketing arrangement with buyers in the USA and that they were confident of reaping the expected results in the coming months.

(v) In January 1990, the First defendant once again wrote to the Plaintiff informing them that their target date for resuming production had been delayed to 15 February 1990 due to 'the Chinese Contractors engaged in plant modification being unable to complete work on time.' (see: p 125, Bundle G).

(vi) On 29 May 1990 the First defendant wrote to the Plaintiff stating that the factory could not be made operational as planned due to work permits of their production manager not being renewed by the Immigration Department.

[78] Considering all the above factors, the Court feels that the defendants' contention about the cessation of operation of their factory was caused by the Plaintiff's negligence and breach of contract must be scrutinised carefully.

[79] The defendants (through the evidence of DW1) have alleged that the Sales Contract was terminated because of a failure, of the first shipment. However, the Court cannot accept this allegation because it was unsubstantiated. If the allegation is true, surely there must be a default notice issued by Sanger against the First defendant, as required by Clause 12(b) of the Agreement concerned. DW1 in his evidence admitted no such notice was ever issued by Sanger. The fact that there was no default notice prior to the termination of the contract (as alleged by the defendants) casts serious doubts on the defendants allegation that the Sales Contract was terminated due to the Plaintiff's alleged failure.

[80] On the question of damages suffered, the First defendant has arrived at the estimation of profit (as a basis for total loss of profit) as the basis of producing and selling 2.5 containers per month for the next 55 months from December 1988 being the unexpired tenure of the Sales Contract with Sanger less costs and the addition of the loss of profit on the first container. This estimation is made on an assumption that 2.5 containers per month will be sold, albeit no purchase orders from Sanger have been tendered in evidence in line with Clause 7 of the Sale Contract which states that 'within the terms of this agreement Sanger Import/Export will make separate offers from time to time to purchase the products from Hasil Getah which offers shall be recorded in purchase orders, which when accepted by Hasil Getah will each constitute a separate contract of sale between the parties.'

[81] Since the reason for termination of the Sales Contract as alleged by the defendants and the date of the termination is not in evidence, the above estimation that the tenure will only expire in 55 months is defective in view of Clause 12(a) and (c) of the Sales Contract which provides inter alia that the Sales Contract may be terminated by 120 days notice and upon the insolvency of either party.

[82] The First defendant itself in the letter dated 20 April 1989 states 'The current market position may require us to decide whether we should accept our buyers offers from Germany based on the europian (European) market prices and produce at break even or below or hold for the next three months without much activity.' And yet the estimation of the total loss of profits is based on the production of and sale of 2.5 containers per month for the next 55 months.

[83] The estimation is also based on the sale price of USD40,000 per container although there was no proof that that was the market value since the defendants themselves conceded that the prices are fluctuating. In this respect the Court is in full agreement with and adopted the passage ruled by Edger Joseph Jr in the case of *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 at p 369, which says:

> To put it another way, a Plaintiff's unsupported assertion or that of this accountant, that he would have got such and such price for the goods does not prove market value. It must be proved aliunde – that is to say in order to prove that someone would have been prepared to pay the price, you call that man who would have paid. Any Plaintiff can say 'I could have sold my goods for $X had it

not been for what the defendant did'. If that is enough to prove market value, it would in effect, dispense with proof of quantum altogether.

[84] The sum claimed (RM7,058,805) has not been proved by the defendants. In cross-examination, at best DW1 states that the aforesaid sum is 'partly estimated and partly actual' and further agreed that the substantial amount was based on estimates. In respect of the actual losses, the onus is on the First defendant to prove that the losses have been incurred. However, the accounts produced by the First defendant are highly questionable and unreliable, since DW1 gave evidence that no accounts were prepared for the years 1989 until 1997 leading to the irresistible inference that the accounts were prepared 10 years later solely for the purpose of the defendants' Counter Claim. No accountant was produced by the defendants to give evidence on the accounts and the auditor (DW4) who appeared, gave evidence that the audit report was based on information supplied by the defendants themselves. The said auditor in fact gave evidence stating that:

I can agree my auditors report cannot be accurate in view of the fact that there were inadequate documents for us to verify or substantiate the amounts or figures.

[85] DW4 has admitted that he has no personal knowledge of the accounts in 1989 and 1990. In this respect the Court adopts the ruling by Edgar Joseph Jr J in *Popular Industries* case (supra) to the effect that:

… even had the account books been in evidence they could not by themselves be sufficient to charge the defendants with liability having regard to section 34 of the Evidence Act 1950 so that the entries themselves would have to be proved by someone having personal knowledge of the transaction reflected in the entries …

[86] The defendants must understand that if they bring action for damages, it is for them to prove their damages; it is not enough to write down the particulars so to speak, throw them at the head of the Court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it (see: dictum in *Bonham-Carter v Hyde Park Hotel* (1948) WN 89 which was adopted in *Lau Sau Kong v Leong Cheng Chiang* [1961] MLJ 17 and also followed by the Federal Court in *Tan Sri Khoo Teck Puat v Plenitude Holdings Sdn Bhd* [1994] 4 MLJ 777).

[87] Causation, being the most essential element upon which a claim stands or falls, remains unproven. Numerous causes are in evidence (even from the defendants themselves) which account for the closure of the factory and the alleged termination of the Sales Contract, which do not involve the Plaintiff. The materiality of causation is illustrated in *Lim Soh Wah & Anor v Wong Sin Chong & Anor* [2001] 2 CLJ 344, where Gopal Sri Ram JCA held as follows:

A Plaintiff may suffer damages. But it is of no consequence unless the defendant negligently caused it. If the damage would have happened anyway, then the defendant cannot be held liable for it. For liability to be visited upon a defendant's head, it must be proved that but for his negligence the harm would not have happened.

[88] The above case (*Lim Soh Wah & Anor*) quoted Lord Wilberforce in the decision in *Wilsber v Essex Authority* [1988] All ER 860, wherein it was held – 'the onus of proving causation lies on the pursuer.' The defendants have failed to prove that the alleged damage was caused by the Plaintiff's breach or negligence. The damages purportedly suffered and claimed by the defendants are in any event too remote and unforseeable and are contrary to s 74 of the Contracts Act 1950.

Conclusion

[89] Based on the above considerations, it is my considered judgment that on the balance of probabilities the Plaintiff has proved its claim against the defendants, and that the defendants have failed to prove their counter claim against the Plaintiff. Therefore, the Plaintiff's claim is allowed with costs and the defendants' counter claim is dismissed with costs.

Plaintiff's claim allowed and defendants' counterclaim dismissed.

Reported by Lim Lee Na